IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 166 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : YES

MANHARBHAI @ MANUBHAI

Versus

STATE OF GUJARAT

Appearance:

MR KG SHETH for Appellant

MR HM PRACHHAK, APP for Respondent

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 02/04/2004

ORAL JUDGEMENT (Per : HON'BLE MR.JUSTICE B.J.SHETHNA)

1. Appellant - accused Manharbhai @ Manubhai Maganbhai Harijan has challenged in this Appeal the impugned judgment and order dated 1.1.97 passed by Shri V.S. Bhatt, Sessions Judge, Panchmahals at Godhra, in Sessions Case No. 165 of 1996, whereby the learned Judge convicted the appellant - accused for the offence under Section 302 IPC and sentenced him to suffer life imprisonment and to pay fine of Rs. 500/- in default to further undergo six months imprisonment.

2. Charge Exh.3 was framed by the learned Judge on 28th September 1996 against the appellant - accused, aged 38 years at that time. It is stated in it that on 22.3.96 at 8.00 p.m. the accused took deceased Rayaliben, aged 55 years, in the Railway Quarter near Halol Railway Station for the purpose of having sexual intercourse. At that time, complainant Vishnubhai Maganbhai Vaghari, son of Rayaliben, had seen the accused sleeping on his mother Rayaliben, therefore, with an intention to kill Rayaliben and with an intention to cause such injury, which may result into death, he committed murder of Rayaliben by pressing her neck and thereby he had committed an offence under Section 302 IPC.

3. Complainant Vishnubhai Maganbhai Vaghari, PW-1 Exh. 6, had lodged his FIR about the incident in question before the Police on the same day i.e. on 22.3.1996 at 9.30 p.m. which was recorded by PSI Harshadkumar Premshankar Dave, PW-5 Exh.20.

4. It is stated in the complaint by complainant Vishnubhai Maganbhai Vaghari that he was staying with his mother Rayaliben and sisters Tini and Rekha at Thorivad, Halol, and maintaining himself by doing some labour work. His elder sister Sangita stays at village Sonavitti. They are four brothers. Eldest one is Dharmendra, stays at village Shivrajpur, Lavgan, younger to him, stays at village Adiran and Bako is the youngest of all and stays with his sister Sangita at village Sonavitti.

He has further stated in his complaint that "today at about 6.30 p.m. he had gone to market. At that time, his sisters - Tini and Rekha had gone to village for begging. At about 9'O clock in the night on coming to his house, he had seen someone sleeping on his mother in the vacant Railway quarter behind his chhapra (house). Thereupon, immediately he went there and saw Manubhai Maganbhai Harijan in the room behind his quarter. Manubhai Maganbhai Harijan got excited and after pressing the neck of his mother ran away. He

lifted his mother and brought her outside his house and sprinkled water on her face, but she did not regain consciousness, therefore, he came running to the bus stand and met his sisters Rekha and Tini and returned to his house. All of them tried to awake their mother, but she did not get up. They felt that their mother was died therefore, he had come to the Police Station to file the complaint.

He has further stated in his complaint that for the purpose of having sexual intercourse, Manubhai Maganbhai Harijan took his mother Rayaliben in the Railway room behind his house. At that time, he (complainant) saw him, therefore, he throttled his mother and by committing her murder he ran away.

5. After registering the FIR, the Police started investigation and arrested the accused on the next day i.e. on 23.3.96. Since then, the appellant - accused is in jail. He is not released on bail either during trail or after admission of the Appeal. Inquest panchnama was prepared on 23.3.96 between 8.00 to 8.45 a.m. which shows that there was skin cut below right eye of the dead body and clotted blood was found there. She had put on white blouse and light yellow colour saree with light blue petticoat which were found on the dead body. On the left knee of the dead body some bruises were found. On the private part of the dead body no mark of violence or force was found. No other visible marks of injuries were found on the dead body. Dead body was identified by complainant Vishnubhai Maganbhai Vaghari and knowing the cause of death, dead body was sent for the postmortem.

6. Panchnama of scene of offence was drawn on 23.3.96 between 9.00 a.m. to 9.30 a.m. Complainant Vishnubhai Maganbhai Vaghari had shown the place of incident. Pit was found on the place of incident and no notable marks were found at the place of incident. House of the complainant was at a distance of 25 feet from the place of incident and the house of the accused Manubhai Maganbhai Harijan was at a distance of 200 feet from the place of incident which was Railway Quarter.

7. Before the Sessions Court, the prosecution had examined complainant Vishnubhai Maganbhai Vaghari, PW-1 Exh.6, as an eye witness, but his two sisters Tini and Rekha were not examined by the prosecution. Prosecution had examined Dr. Bhagwantsinh Punamchand Itare, who had performed postmortem of deceased Rayaliben on 23.3.96 between 10.00 and 10.50 a.m. Postmortem Note is produced at Exh. 17. Panch witness Govindbhai Maganbhai of

panchnama of scene of offence is examined as PW-3 Exh.10 turned hostile. Harshadkumar Premshankar Dave, PSI, who had investigated the case, is examined as PW-5 Exh. 20. Police Constable Vajesinh Hemabhai, PW-6 Exh. 21, was examined to prove the complaint along with other police witnesses. Defence of the accused was one of total denial and according to him false case was filed against him by the complainant as they were demanding money from him which he refused to give

8. Learned Sessions Judge after considering the evidence as well as documentary evidence led by the prosecution and defence of the appellant - accused, came to the conclusion that the prosecution has proved its case against the appellant - accused beyond reasonable doubt and, therefore, convicted the appellant - accused for the offence under Section 302 IPC for committing the murder of Rayaliben and sentenced him to suffer life imprisonment which is challenged in this Appeal by the appellant - accused through Jail.

9. Learned Counsel Shri K.G. Sheth for the appellant- accused has taken us through the entire evidence on the record of this case and the reasoning assigned by the learned Sessions Judge in his judgment and order for convicting the accused under Section 302 IPC. He vehemently submitted that against the elementary principle of Criminal Law, the learned Judge by giving flimsy and absolutely unsustainable reasons, convicted the appellant - accused for a major offence like Section 302 IPC when the prosecution has miserably failed to prove its case beyond reasonable doubt. He submitted that after the order of conviction and sentence dated 1.1.97 passed by the learned Sessions Judge, the appellant accused has remained in jail for a period of more than 7 years, and that golden period of his life is not going to come back even if his Appeal is allowed and he is ordered to be set at liberty. For appreciating this submission of Mr.Sheth, we have carefully considered the evidence of sole eye witness complainant Vishnubhai Maganbhai Vaghari (PW-1 Exh.6) and the evidence of other prosecution witnesses. We would like to narrate the relevant evidence of complainant Vishnubhai Maganbhai Vaghari (PW-1 Exh. 6) which is as under :

This prosecution witnesses Vishnubhai Maganbhai Vaghari, PW-1 Exh.6 was aged about 19 years when he deposed before the Court on 3.10.96. He is the son of deceased Rayaliben, therefore, he is highly interested witness. Therefore, being close relative of the deceased, his evidence is required to be closely

scrutinised. It is no doubt true that merely because he is close relative of the deceased, which itself should not be a ground to discard his oral testimony if otherwise his evidence is found to be trustworthy and reliable. However, if his evidence is found to be not trustworthy and reliable, then, certainly his evidence can never be relied on for convicting the appellant accused or confirming the order of conviction and sentence passed by the learned Sessions Judge.

He has stated in his evidence before the Court that they are four brothers and three sisters. At the time of incident, he was staying with his mother Rayaliben and his sisters Tiny and Rekha. His elder brother Sangita got married at Sonavitti village. His elder brother Dharmendra stays at Shivrajpur and doing labour work, Navdhan, younger to him (Dharmendra), stays at Aligat village and his youngest brother Bako stays with his sister Sangita. Incident in question took place six months before at about 8.00 p.m. in the night. He had been to the market. He returned to his house from market at 8.00 p.m. His house is near the Railway Station and there is a small railway room nearby his house. At that time, he had seen accused Manubhai Maganbhai Harijan having sexual intercourse with his mother. Thereupon, he caught the heirs of Maniya. At that time Maniya pressed the neck of his mother and killed her and ran away. At that time his sisters Tini and Rekha had come there. All of them brought their mother outside the room and sprinkled water on her, but she did not regain consciousness and died. He and his both sisters had gone to the Police Station and lodged the complaint Exh.7. Police came to his house and drawn the panchnama and sent the dead body of his mother to the Hospital. He does not know why the accused killed his mother.

From the evidence-in-chief, it is clear that motive is not proved in this case. His first version before the Police in his FIR was that he had seen some person sleeping on his mother in the vacant railway quarter behind his house. Thereupon, he had immediately gone there and having seen him, the accused Manubhai Maganbhai Harijan got excited and after pressing the neck of his mother, ran away. Whereas in his evidence before the Court he stated that he had seen the accused Manubhai Maganbhai Harijan having sexual intercourse with his mother, therefore, he caught the heirs of accused Manubhai Maganbhai Harijan, and at that time Maniya had pressed the neck of his mother and ran away. That time his sisters Tini and Rekha came. Whereas in FIR he has

stated that he took his mother and brought her in front of his house but she did not regain consciousness, therefore, he had gone to bus stand and came back with his sisters Tini and Rekha. No doubt it is true that in the last part of the FIR he has stated that with an intention to have sexual intercourse, accused Manubhai Maganbhai Harijan took his mother in the railway room, but in the FIR he had not stated that accused was having sexual intercourse with his mother. In FIR he has only stated that he had seen one person lying on his mother. Before the Court he had stated that he caught the heirs of Maniya which was not stated by him in his FIR. Thus, there is lot of variance in his complaint lodged before the Police and the evidence before the Court.

In his cross-examination, firstly he has stated that his mother must be 70 years and immediately thereafter he stated that she must be about 60 years, his father died 10 years back, Maniya (accused) must be 40 years. However, he was not prepared to state as to whether there was relation between accused Manubhai Maganbhai Harijan and his mother. In his cross-examination, he has, at least, admitted the fact that while standing near the door of his house, nothing can be seen in the room (where the incident had occurred). He has also admitted that more than 50 houses are nearby his house and near the room where the incident had occurred. There are other railway quarters. People were passing nearby the room. If he can raise shouts from his house then the same can be heard by his neighbours. If shout is raised from the room, then also the same can be heard by others. He has admitted in his cross-examination that while coming from market, first room where the incident had occurred comes and then his house. He had not gone to his house. When he had seen inside the room, he had seen his mother lying on the ground and accused was sleeping over her, which he had seen from outside the room. He had seen the heads of both the persons from the place where he was standing. He did not raise shouts. His mother also did not raise shouts. He raised shouts only after the accused ran away. He caught the heirs of Maniya, thereafter he (accused) pressed the neck of his mother. He had tried to save his mother. At the time of incident, his mother and Maniya had put on clothes. After Maniya ran away, he immediately raised shouts and on hearing his shouts, everyone had come including Bhulabhai, Parsingbhai, Bakabhai and Bhaijibhai. For lodging the complaint, all three of them (complainant and his two sisters) had gone immediately after the incident to the Police Station. Police recorded the FIR as per his say. He has stated in

the cross-examination that it is not true that he had not stated in his FIR that he caught the heirs of Maniya. He has also stated that it is not true that he has not stated in his complaint that Maniya was having sexual intercourse with his mother. " This has been proved in the evidence of PSI Shri Harshadkumar Premshankar Dave, PW-5 Exh. 20 that he (the complainant) had not stated in his FIR that he has caught the heirs of Maniya and has seen that Maniya was having sexual intercourse with his mother."

In his cross-examination, he has refused to admit that he was habituated to consume liquor but he has admitted that his mother was habituated to take liquor every night. However, he has denied that on the day of the incident, she had taken lot of liquor. He has further stated in his cross-examination that the Doctor Dispensary is hardly at 2 to 3 minutes distance from his house, but he had not taken his mother from his house to the Dispensary. Accused Maniya was serving in Railway. He has denied the suggestion that they were often demanding money from him (accused). He has also denied the suggestion that on the day of incident also he demanded money which was not paid by the accused, therefore, false case was filed against him. He has also denied the suggestion that because of consuming more liquor his mother died natural death. He stated that for filing this case he has not received any money from the Government.

In a question put by the Court after his cross-examination was over, he has stated that when he caught the heirs of accused, then the accused pressed the neck of his mother for about two minutes.

From the aforesaid cross-examination of the complainant Vishnubhai Maganbhai Vaghari, it is clear that deceased Rayaliben was old, widow, aged 60 years, whereas the appellant - accused was in his 40. In fact, he was 34 years old. If the complainant had seen the accused doing sexual intercourse with his mother, then they would not be doing with the clothes put on by them. We will immediately come to the evidence of Dr. Bhagwatsinh Punamchand Itare, PW-4 Exh.16, who has performed the postmortem of deceased Rayaliben. He has not stated in his evidence before the court that there was any symptom of sexual intercourse. Complainant claimed that he caught the heirs of accused while doing intercourse with his mother, but the immediate reaction of a person would be to attack the person who had actually caught his heirs and not a lady who was a

consenting party. Why we say consenting party because the complainant said that his mother was lying on the ground and accused was sleeping on her and doing intercourse, but his mother did not raise any shouts. If the complainant had really caught the heirs of the accused, then at least, some heirs of the accused should have been there either in the hands of the complainant or at the place of the incident, but the panchnama of scene of offence shows nothing. It is surprising to note that though this witness claimed to have seen the accused having sexual intercourse with his mother in the railway room, he had not raised any shouts. According to him, he raised shouts only after the accused ran away after pressing the neck of his mother and on hearing his shouts, many people have come to the place of incident including Bhulabhai, Parsingbhai, Bakabhai and Bhaijibhai, but none of them was examined by the prosecution. The prosecution has not even examined both the sisters (Tini and Rekha) of the complainant. It has also come in his cross-examination that though the Doctor Dispensary was hardly at a distance of 2 to 3 minutes from the house, he had not taken his mother there. He has also admitted that for filing this case he had not received anything from the Government. When the medical evidence does not support his say about sexual intercourse done with the deceased, then his evidence cannot be acted and relied upon for the purpose of convicting the appellant - accused. It is no doubt true that he had denied the suggestion that the accused was serving in Railway, from him they were demanding money, and on that day when money was not paid, he had filed the false case. But, the way in which he had deposed before the court speaks volumes about his evidence. His conduct at the time of incident was absolutely unnatural. The way in which he had deposed before the court shows that his evidence is not at all reliable and he must not have witnessed the incident.

8. We have carefully gone through the judgment and order of the learned Sessions Judge for convicting the appellant - accused for the offence under Section 302 IPC and more particularly the reasons assigned by him in Para-23 of the judgment. We are really shocked and surprised with the reasoning assigned by the learned Judge in Para-23 of his judgment when he found the conduct of the complainant of not raising shouts natural when he had seen his mother and the accused in a compromising position. According to the learned Sessions Judge, such conduct of a person would be quite unnatural. It left us, must to desire. Many important facts like catching heirs of the accused while doing intercourse

with his mother and sexual intercourse being done by the accused with his mother not stated in the complaint, etc. have been totally ignored by the learned Judge by stating that it was not necessary for the complainant to give all these details in his complaint. Similarly, the learned Judge has not at all considered the fact that nearby the place of the incident there was no light. Therefore, it was not possible for the complainant to see his mother and the accused having sexual intercourse in the room. Surprisingly, the learned Judge rejected this contention by stating that it was Chaitra Sud Trij and that there was moon, therefore, in the moon light he could have seen that. We all know that on the third day of Chaitra Sud Trij, how much moon light would be there. Even if there was some moon light, then also it would not be possible for any one to see inside the dark room in moon light where the incident had occurred because the incident had not happened in open place. Thus, from the reasoning assigned by the learned Sessions Judge for convicting the appellant accused, we are not at all satisfied. In our considered opinion Mr. Sheth, learned counsel for the appellant accused was fully justified in submitting that the learned Sessions Judge has completely ignored the well settled principle of Criminal Law by assigning reasons which were not at all sustainable and convicted the appellant - accused for the serious offence under Section 302 IPC. While passing the impugned order of conviction, the learned Sessions Judge has totally forgotten the principle laid down by the Supreme Court in number of cases that let ninety nine culprits may go scot-free but one innocent may not be wrongly convicted.

9. One more important circumstance was not at all considered by the learned Sessions Judge, namely, that at the time of postmortem, Doctor has found that deceased Rayaliben had put on white colour saree but no petticoat was there on the dead body. Whereas the inquest panchnama shows that she had put on light yellow colour saree and light blue colour petticoat. This was admitted by PSI Shri Harshadkumar Premshankar Dave (PW-5 Exh.20) in his cross-examination. PSI Shri Dave has also admitted in his cross-examination that he had not got examined the accused who was immediately arrested on the next day of the incident i.e. on 23.3.1996. Shri Dave had also admitted in his cross-examination that no injury was shown on the neck of the deceased in the inquest panchnama and that he had not recorded the statement of people of Thora community staying nearby the place of incident. Dr. Bhagwatsinh Punamchand Itare (PW-4 Exh. 16) has clearly stated in his cross-examination that if somebody pressed the neck, then his finger print would be

there on the neck. Dr.Itare has also stated in his cross-examination that if someone tries to press the neck of other person, then the said person would try to save, and in that process, soil would come out from that place and there would be small pit holes at the place of incident. But, the panchnama of scene of offence (Exh. 11) does not show anything at the place of incident. In fact, PSI Harshadkumar Premshankar Dave (PW-5 Exh.20) has stated nothing about this, in his evidence before the Court. These important aspects of the case have not at all been taken into consideration by the learned Sessions Judge and in a most cursory manner the learned Sessions Judge decided the case by his judgment running into 28 typed pages and convicted the appellant accused for serious offence under Section 302 IPC only on the sole testimony of highly interested witness complainant Vishnubhai Maganbhai Vaghari, whose evidence is not at all trustworthy or reliable.

10. Before parting, we must state that the courts are there to do justice. Passing such order of conviction on such evidence, the learned Sessions Judge has literally robbed the golden period of seven years of the appellant accused by ignoring golden principle of criminal law that let ninety nine may go scot-free but one innocent may not be wrongly punished.

11. In view of the above discussion, this Appeal is allowed and the impugned judgment and order dated 1.1.1997 passed by the learned Sessions Judge, Panchmahals at Godhra, in Sessions Case No. 165 of 1996, convicting the appellant - accused Manherbhai @ Manubhai Maganbhai Harijan and sentencing him to suffer life imprisonment and to pay fine of Rs. 500/- in default to further undergo six months imprisonment is hereby quashed and set aside. The appellant - accused is ordered to be set at liberty forthwith if he is not required in connection with any other case. Fine, if paid, be refunded to the appellant - accused forthwith.

(B.J. Shethna, J.)

(J.R. Vora, J.)

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